

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35536

CHRISTOPHER CONLEY TAPP,)	2010 Unpublished Opinion No. 412
)	
Petitioner-Appellant,)	Filed: March 31, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Joel E. Tingey, District Judge.

Order summarily dismissing a petition for post conviction relief, affirmed in part, reversed in part, and remanded.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

GRATTON, Judge

Christopher Conley Tapp appeals from the district court's summary dismissal of his application for post-conviction relief. We affirm in part, reverse in part, and remand.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The basic facts of this case were summarized in this Court's previous opinion in *State v. Tapp*, 136 Idaho 354, 33 P.3d 828 (Ct. App. 2001), as follows:

Early in the morning of June 13, 1996, Angie Dodge was raped and stabbed to death in her apartment in Idaho Falls. On January 7, 1997, twenty-year-old Christopher Tapp voluntarily submitted to police questioning about this crime at the Law Enforcement Building (LEB) in Idaho Falls. Tapp again voluntarily went to the LEB for questioning on January 10. After this interview, Tapp's parents retained private counsel for their son. When Tapp did not appear at the LEB for another scheduled interview on January 11, police officers went to his home to find him. They were informed by Tapp's mother that an attorney had

been retained and that Tapp would appear on January 13, with counsel, to answer more questions. Approximately an hour later, the Idaho Falls chief of police arrived at the Tapp home and attempted to convince Tapp's mother to change her mind about her son's refusal to be interviewed without assistance of counsel. She refused. Rather than waiting for a voluntary interview on January 13, law enforcement officials obtained a warrant to arrest Tapp on a charge of accessory to a felony, Idaho Code §§ 18-205, -206, and he was arrested on January 11.

After making the arrest, an officer put Tapp in an interview room and called Tapp's attorney. Before the attorney's arrival, the officer initiated a discussion with Tapp about the type of information the police wanted to obtain from him.¹ On January 13, another attorney joined in Tapp's representation as co-counsel. Thereafter, Tapp was interviewed, while under arrest and in police custody, on January 15 and 17. During all interviews at the LEB from January 15 forward, Tapp was separated from his attorneys. The attorneys were placed in a nearby office in the LEB where they were allowed to observe the interviews on a closed-circuit television. Tapp's only contact with his attorneys was during breaks in the interviews. His attorneys apparently made no objection to this arrangement.

In the first few interviews Tapp denied having any knowledge of the crime, then claimed that Ben Hobbs had confessed to killing Dodge and had asked Tapp to help him with an alibi. Tapp denied having ever been at the crime scene. By January 15 and 17, however, Tapp's story was changing, and he admitted that he had accompanied Hobbs to Dodge's apartment on the night of the murder. Tapp told police that Hobbs wanted to confront Dodge because Hobbs believed that she had convinced Hobbs's wife to leave him. Tapp claimed that Hobbs and Dodge started fighting and that Hobbs punched Dodge and then stabbed her twice. Tapp asserted that he ran from the apartment at that point. He admitted that he returned later and found Dodge dead and no one else present. Tapp also implicated a man named Jeremy Sargis in the crime. Tapp said he believed that the murder weapon belonged to Sargis, but he initially claimed that Sargis was not in the apartment that night. Eventually, however, Tapp accused Sargis of helping to rape and murder Dodge.

On January 15, Tapp and the State entered into a "limited use immunity" agreement, and on January 17 they entered into a "cooperation and settlement agreement." These agreements (hereinafter referred to collectively as the "immunity agreements") required Tapp to cooperate with the police investigation of Dodge's death and to provide the police with truthful information about the crime. Tapp also agreed to plead guilty to aiding and abetting an aggravated battery, a felony, I.C. §§ 18-903, -907, and the State agreed not to file any other charge against Tapp related to Dodge's death. The State also promised to recommend at the sentencing hearing that the district court retain jurisdiction for a limited period pursuant to I.C. § 19-2601(4), and to allow withdrawal of the guilty

¹ Tapp's statements made during this interview before the arrival of his counsel were later suppressed by the district court and are not at issue in this appeal.

plea if the judge did not follow the recommendation. The State also agreed not to use any of Tapp's statements against him except for impeachment purposes. As a consequence of the immunity agreements, the pending charge against Tapp for accessory to a felony was dismissed on January 17 and he was released from custody.

Tapp was again questioned on January 18 and 29. Before the January 29 interview began, the prosecutor informed Tapp and his attorney that the prosecutor considered the immunity agreements with Tapp to be void because Tapp had not been truthful in describing the crime. The prosecutor explained that Tapp's contention that Hobbs and Sargis were the rapists was contradicted by DNA tests showing that semen found on Dodge's body and clothing did not come from either of those men (or from Tapp). Despite this declaration from the prosecutor, Tapp and one of his attorneys continued with the January 29 interview. On that date, Tapp was given a polygraph test, during which he asked to be taken to the apartment where the murder occurred. Tapp's attorney agreed that the police could take Tapp to the crime scene for further questioning, but the attorney declined to accompany Tapp and the officers. Once at the crime scene, Tapp made statements implicating himself in the crimes. At the crime scene and later the same day at the LEB, Tapp admitted that he had held Dodge's arms and shoulders down throughout the rape and stabbing. In his new account of the events, Jeremy Sargis was replaced by a different male whose name Tapp could not remember. Some details of his story about how Dodge was raped and details of other events of that night changed during this and two subsequent interviews.

Tapp was rearrested after the January 29 interview. The next day, he was again charged with being an accessory to a felony. Tapp was further interviewed on January 30 and 31. On February 3, 1997, charges of rape, I.C. § 18-6101(3), (4), and first degree murder, I.C. §§ 18-4001, -4002, -4003(a), replaced the accessory charge.

Tapp, 136 Idaho at 357-58, 33 P.3d at 831-32. Tapp was found guilty by a jury. *Id.* at 358, 33 P.3d at 832.

On appeal, this Court ruled that the January 15, 17, 30, and 31 interviews violated Tapp's right to counsel and should have been suppressed. *Id.* at 362, 33 P.3d at 836. However, this Court held that the statements made on January 7, 10, 18, and 29 were not subject to suppression, specifically upholding the district court's finding that the statements were not the product of coercion or involuntary and that Tapp's *Miranda*² rights were not violated on January 29 because he was not in custody at the time the of the January 29 statements. *Tapp*, 136 Idaho at 362-365, 33 P.3d at 836-839. Tapp's conviction was affirmed because this Court held, beyond a

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

reasonable doubt, that the verdict would have been the same in light of his detailed confession on January 29. *Id.* at 366, 33 P.3d at 840.

The issues on appeal from Tapp's post-conviction application are, essentially, responsive to this Court's prior opinion. Tapp contends that: (1) had his defense counsel presented additional facts regarding the circumstances surrounding the confession made on January 29, he would have demonstrated that Tapp was in custody at the time, and that the confession was obtained in violation of Tapp's *Miranda* rights, (2) had counsel presented information as to Tapp's mental health he would have demonstrated involuntariness of his confession, and (3) had counsel called Tapp to testify at trial he would have explained how his confession was coerced. Tapp also asserts that appellate counsel was ineffective for failing to anticipate that this Court would find certain statements suppressible and argue from that determination that the statements made on January 29 were fruit of the poisonous tree. The State made a motion for summary dismissal of Tapp's application, which the district court initially granted in part and denied in part. After the State's motion to reconsider, the district court summarily dismissed all of Tapp's claims. Tapp appeals.

II. ANALYSIS

Tapp appeals the summary dismissal of his application for post-conviction relief. Tapp alleges the district court erred in failing to grant an evidentiary hearing on his claims of ineffective assistance of counsel.

On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); *see also Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court, rather than a jury, will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those

inferences. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008); *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483.

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). A criminal defendant's right to effective representation by counsel includes on appeal. *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997).

A. Ineffective Assistance of Counsel Incident to the Motion to Suppress in Failing to Present the Circumstances of the January 29 Confession to Establish Tapp was in Custody

Tapp claims that his trial counsel was ineffective for failing to present all of the circumstances of the January 29 events in order to demonstrate that Tapp was, in fact, in custody at the time of the statements he made on that date. This Court addressed the issue of custody in the direct appeal as follows:

The parties disagree as to whether Tapp was "in custody" during the January 29 questioning, which occurred at the LEB and at the crime scene. The district court made no express finding of fact on the issue, but Tapp asserts that the district court implicitly found that he was in custody on January 29. The failure to make explicit findings of fact "is not fatal to the determination of a

suppression motion. Instead, we ‘examine the record to determine the “implicit” findings which underlie the judge’s order.’” *State v. Birkla*, 126 Idaho 498, 501, 887 P.2d 43, 46 (Ct. App. 1994) (quoting *State v. Middleton*, 114 Idaho 377, 380, 757 P.2d 240, 243 (Ct. App. 1988)).

It is clear that Tapp was not under formal arrest at the time of his January 29 interviews. However, formal arrest is not a factual prerequisite to a finding of custody. For *Miranda* purposes, “custody” occurs when “a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317, 335 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279-80 (1983)). This is an objective test that is based on the totality of the circumstances; the inquiry is “how a reasonable man in the suspect’s position would have understood his situation.” *Berkemer*, 468 U.S. at 442, 104 S.Ct. at 3141, 82 L.Ed.2d at 336. See also *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 713-14, 50 L.Ed.2d 714, 719 (1977); *Birkla*, *supra*.

The surrounding circumstances establish that Tapp was not “in custody” when he was interrogated by police on January 29. Tapp initially appeared voluntarily at the LEB on that date with counsel and was told at the outset that the prosecutor considered the immunity agreements to be void. Despite this development, Tapp did not decline further interviews or invoke his privilege against self-incrimination. There is no evidence that the police ever told Tapp that he could not leave or that he had to undergo interrogation. At no time during questioning was he under arrest or led to believe that he was under arrest. In fact, an officer at one point told Tapp that although it was likely he would eventually be going to prison, he wasn’t going to be put in jail that day. Tapp himself asked to be taken to the crime scene, where the interview continued and where he ultimately made some of his most self-incriminating statements. His attorney was invited, but declined, to accompany him. Having reviewed the record, we conclude that the district court did not implicitly find that Tapp was in custody during the January 29 interviews, and if such a finding had been made, it would not be supported by the record. We hold that Tapp was not in custody on January 29, and therefore his Fifth Amendment right to counsel did not attach and was not violated. Only Tapp’s statements made on January 15, 17, 30, and 31 are suppressible for Fifth Amendment violations.

Tapp, 136 Idaho at 362-63, 33 P.3d at 836-37. Thus, this Court rejected Tapp’s claim that he was in custody at the time he made incriminating statements on January 29.

In support of his post-conviction claim, Tapp submitted an affidavit with an attached addendum. The addendum sets forth his allegations of the circumstances occurring on January 29. Many of the assertions in the addendum are consistent with the factual statements set out in our prior opinion or are unrelated to the question of custody at the time of making the statements. However, Tapp argues that his trial counsel should have been presented certain information in the addendum because it bore on the issue of whether he was in custody. Tapp points to his

assertions in the addendum that: (1) on various occasions during the course of events he was left in the interrogation room and the door was locked, (2) he was transported to the apartment in the back seat of the police car with the car doors locked, (3) while walking up the stairs to the apartment he overheard one of the officers say “we should just take him out some where and shoot him, or, we could do the same thing to him that the poor girl went through,” and the officers smiled at him, and (4) the police blocked him from leaving while in the apartment and kept him from his attorneys after he requested their presence. Tapp argues that his counsel’s performance was deficient for failing to have him testify to these assertions at the suppression hearing.

The post-conviction court dismissed the claim on the ground that this Court’s determination in the direct appeal that Tapp was not in custody on January 29 precluded his re-litigating the issue. We disagree to the extent that Tapp’s post-conviction claim is, essentially, that because counsel failed to present all of the circumstances occurring on January 29, neither the trial court nor this Court on review possessed the facts necessary to make the determination as to custody. Tapp has attempted to submit additional facts, which he contends counsel should have presented at the suppression hearing, which would have actually demonstrated that he was in fact in custody and, therefore, his statements should have been suppressed. The district court, apparently due to its determination that Tapp could not re-litigate the issue,³ did not consider any potential effect that the alleged additional facts would have on the question of whether Tapp was in custody. Instead, the district court noted the facts previously presented, stating that “these facts were not disputed by the State and both the district court and the appellate court explicitly recognized those facts in making their decision not to suppress the January 29 statements.” Without recognition of the alleged additional facts presented by Tapp, the district court concluded that “Tapp has failed to point to any other facts his counsel could have used to argue that he was in custody during the January 29 interrogations.”

Tapp argues that, if the facts set forth in the addendum are considered in the light most favorable to him, the district court should have granted him an opportunity to present such

³ We note that Tapp’s post-conviction counsel, in essence, invited the district court’s determination as to the preclusive effect of this Court’s prior opinion by acknowledging that certain of Tapp’s claims had been addressed by this Court and failing to argue that Tapp was not precluded from presenting the post-conviction claim because of the alleged additional facts.

testimony at an evidentiary hearing in order to determine whether the additional evidence would have resulted in a determination that Tapp was, in fact, in custody. The State points out, as noted above, that many of the assertions in the addendum were previously considered. The State further argues that Tapp has failed to allege or prove that the additional facts in the addendum, particularly the allegations that he was threatened and blocked from leaving, were ever made known by him to trial counsel, such that trial counsel could have been ineffective for failing to call him to so testify and is information that counsel surely would have raised if known. In addition, the State contends that the evidence demonstrates that Tapp was in communication with counsel at times, that the interview room door appears to be unlocked as evidenced by the videotape and that the claim by Tapp in the addendum that he told the officers that “I’m going to tell him about your threats” is belied by the videotape. Finally, the State suggests that the alleged threat to take him out and shoot him, unspecified threats of harm, and keeping him from counsel are arguments of coercion as opposed to custody. Since the district court did not consider the alleged additional facts in granting summary dismissal, we remand for the district court to do so.

B. Ineffective Assistance of Counsel at the Suppression Hearing for Failing to Investigate and Present Tapp’s Diminished Mental Capacity to Show the Confession was Involuntary

Tapp claims his counsel was ineffective for failing to present evidence at the suppression hearing of his diminished mental capacity that would have led to a finding that the confession was involuntary and should have been suppressed. Generally, the use of involuntary confessions against a defendant violates due process. *Miller v. Fenton*, 474 U.S. 104, 109-110 (1985); *State v. Doe*, 131 Idaho 709, 712, 963 P.2d 392, 395 (Ct. App. 1998). The exclusionary rule “applies to any confession that was the product of police coercion, either physical or psychological, or that was otherwise obtained by methods offensive to due process.” *State v. Doe*, 130 Idaho 811, 814, 948 P.2d 166, 169 (Ct. App. 1997). In determining whether a statement was involuntary, the inquiry is whether the defendant’s will was overborne by police coercion. *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991); *Doe*, 131 Idaho at 713, 963 P.2d at 396. “[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). “[T]he proper inquiry is to look to the totality of the circumstances

and then ask whether the defendant's will was overborne." *Fulminante*, 499 U.S. at 287; *State v. Troy*, 124 Idaho 211, 214, 858 P.2d 750, 753 (1993). These circumstances include:

1. Whether *Miranda* warnings were given;
2. The youth of the accused;
3. The accused's level of education or low intelligence;
4. The length of the detention;
5. The repeated and prolonged nature of the questioning; and
6. Deprivation of food or sleep.

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *Troy*, 124 Idaho at 214, 858 P.2d at 753.

Regarding voluntariness, the trial court identified the issues in the motion to suppress as:

In particular, Tapp asserts (1) that the police told him that he was assisting them in their investigation of Hobbs and not that he was providing statements which could later be used against him, (2) that implied promises of leniency were made during the interviews and explicit promises of leniency were made in the immunity and settlement agreements, and (3) that the police took advantage of his "boyish reliance on Detective Fuhrman's representations and authority."

At the suppression hearing, Tapp's mental capacity, other than his "boyish reliance" was not argued as a basis for finding the confession involuntary. Nor was it addressed in the trial court's decision on the motion to suppress. The trial court found that Tapp knew that he was a focus of the investigation and that he had a right to counsel. The court found that rather than the police having deceived Tapp, the police had believed Tapp's initial representation that he did not participate in the crime. The court found the officers did offer an implied promise of leniency, but the explicit promise of leniency was conditioned on Tapp's statements being accurate and him not having caused any physical harm to the victim. The trial court did find that Tapp was "relatively young and inexperienced with the tactics employed in police interrogations" but also found Tapp was well aware of the gravity and potential ramifications of being a participant in the crime. Based on these facts, the court ruled that "Tapp's will was not overcome by police conduct in the various interviews."

On direct appeal, this Court, looking at the totality of the circumstances, stated:

When Tapp was interviewed, he was twenty years old and had a high school education. There is no indication that he has an unusually low IQ or suffers from any cognitive defects. The interviews occurred on several days over the course of a month's time. They varied in length, but, with the exception of the January 11 interview, they took place during daylight hours. Tapp does not argue that he was subjected to interrogations of excessive length or that he was deprived

of food or sleep. Miranda warnings were given to Tapp before each interview. All of these factors weigh against a finding of involuntariness.

Tapp, 136 Idaho at 364, 33 P.3d at 838. This Court analyzed these facts together with Tapp's allegations of coercion, that the police made promises of leniency, improperly used his religious beliefs, "used various interrogation techniques to confuse him and coerce him into saying whatever the police wanted to hear," and heightened his anxiety with provocative and hypothetical questions. *Id.* at 364-65, 33 P.3d at 838-39. On the record then presented, this Court held that "Tapp's disclosures to police⁴ were not the product of police coercion."

In support of his ineffective assistance of counsel claim, Tapp has submitted additional evidence regarding his mental capacity which he claims trial counsel should have presented in the motion to suppress. Tapp provided report cards showing poor performance, scores in the lowermost percentiles from the Iowa Tests of Basic Skills, and reports indicating Tapp attended special education classes. Tapp also submitted the affidavit of his associate trial counsel who indicated that she had learned from Tapp that he had attended special education classes and had been evaluated by a mental health professional. She stated that Tapp told her that lead trial counsel had not asked about this information.

Tapp also submitted an affidavit from Dr. Corgiat, a psychologist. Dr. Corgiat stated that he was retained by defense counsel in 1997, and was provided records in apparent contemplation of examining Tapp. It does not appear from his affidavit that he examined Tapp or was ultimately asked to do anything at that time. In his affidavit, he stated that he retained the records previously provided and upon reviewing them, noted a history of resource room assistance, possible AD/HD and other cognitive difficulties, as well as a history of psychotherapy/counseling, and chemical dependency treatment. Dr. Corgiat noted that the records suggested prominent nonverbal learning disability characteristics, including deficits in executive function abilities consistent with poor planning, impulsivity, poor judgment, and an inability to benefit from consequence-based paradigms. Dr. Corgiat stated that, based upon the records, there was reason to obtain a competency evaluation. Dr. Corgiat also stated:

It is my opinion that the mental health issues contained in Mr. Tapp's file would raise serious questions about the validity of any "confessions" made to

⁴ Relative to the statements made on January 7, 10, 18 and 29.

police in relation to the rape and murder of Angie Dodge. I believe that his Nonverbal Learning Disability coupled with the ongoing interrogations that he underwent may have rendered him susceptible to the interrogation process.

Tapp avers that his trial counsel knew of Dr. Corgiat's opinion, but did not discuss its use with him at trial or sentencing. Tapp's affidavit submitted in support of post-conviction relief, stated that he suffered many psychological problems, for which he received counseling and was medicated from age 10. He contends that had trial counsel investigated, his mental illness would have been revealed. In the addendum, Tapp's recitation of the events of January 29 referred to the length of time he spent waiting in the interrogation room and to having been "tired, scared and hungry."

As with the custody issue, the post-conviction court dismissed the claim on the ground that this Court's determination in the direct appeal precluded his re-litigating the issue and was the law of the case. We again disagree to the extent that Tapp's post-conviction claim is, essentially, that because counsel failed to present information regarding his diminished mental capacity, neither the trial court nor this Court on review possessed the facts necessary to make the determination as to the voluntariness of his confession. Tapp has attempted to submit additional facts, which he contends counsel should have presented at the suppression hearing, which would have demonstrated his diminished mental capacity and its bearing on the voluntariness of his statements. The district court, apparently due to its determination that Tapp could not re-litigate the issue,⁵ did not consider any potential effect that the alleged additional facts would have on the question of voluntariness. Instead, the district court stated that the trial court would have considered mental state as a component of the analysis of whether the statements were involuntary and coerced and, again, noted both the trial court and this Court's prior analysis and recitation of the evidence relative to mental condition and police coercion.

Tapp argues that, if the facts alleged in the affidavits and addendum are considered in the light most favorable to him, the district court should have granted him an opportunity to present such testimony at an evidentiary hearing in order to show diminished mental capacity and its effect on whether the confession was voluntary. The State contests Tapp's proposed evidence.

⁵ We note, as with the custody issue, that Tapp's post-conviction counsel, in essence, invited the district court's determination as to the preclusive effect of this Court's prior opinion by arguing only that the diminished capacity information should have been presented at trial and that the suppression hearing issue had already been determined by this Court.

However, again, the district court determined that this Court's prior opinion was the law of the case and did not consider the alleged additional evidence. Since the district court did not consider the alleged additional facts in granting summary dismissal, we remand for the district court to do so.

C. Direct Violation of the Right to Testify

Tapp argues, for the first time on appeal, that his claim that counsel was ineffective for failing to call him as a witness should have been analyzed by the district court, not just as an instance of ineffective assistance of counsel, but also as a direct violation of his right to testify. Tapp argues that under *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009), a district court must analyze an allegation of ineffective assistance of counsel for failure to call the defendant as a witness, as a direct denial of his constitutional right to testify. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Tapp not only pled the issue as an ineffective assistance of counsel claim, but presented the issue to the district court as an ineffective assistance of counsel claim. Tapp's memorandum in opposition to motion for summary dismissal states that "the relief sought is for the court to review the adequacy of representation in all stages of proceedings." Moreover, Tapp's claim, based upon his reading of *DeRushé*, was recently rejected by this Court. *Barcella v. State*, ___ Idaho ___, 224 P.3d 536 (Ct. App. 2009) (holding that *DeRushé* "does not mandate that a claim of ineffective assistance of trial counsel for failure to allow the defendant to testify be analyzed as a direct constitutional violation").

D. Ineffective Assistance of Counsel for Failure to Call Tapp to Testify

Tapp argues that he established a material issue of fact as to counsel's effectiveness in failing to have Tapp testify at trial. Every criminal defendant has a right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44 (1987); *State v. Hoffman*, 116 Idaho 689, 690, 778 P.2d 811, 812 (Ct. App. 1989). Counsel may advise the defendant regarding the wisdom and propriety of testifying; however, the defendant has the ultimate authority to decide whether or not to testify. *Kuehl v. State*, 145 Idaho 607, 611, 181 P.3d 533, 537 (Ct. App. 2008). Although counsel's assistance may be deficient regarding the defendant's right to testify, there is no prejudice when the court is satisfied beyond a reasonable doubt that the error did not affect the jury's verdict; any error is therefore harmless. *Id.*

Tapp alleges that he should have been called to testify so that the jury could consider his testimony in evaluating the weight to be given the other evidence presented at trial, most particularly, the videotape of the confession on January 29. Tapp's claim focuses on his contention that his testimony would show "how Sgt. Fuhriman and Detective Finn threatened me, and coerced me into a confession in this crime, and explain the events concerning this crime." Tapp also refers to the addendum setting forth his version of events occurring on January 29. In addition, in a supplemental affidavit, Tapp alleged that "I knew I had to tell the jury that the tapes were not true."

The State argued below that the circumstances in regard to this claim are similar to those in *Kuehl*. Kuehl asserted an ineffective assistance of counsel claim in regard to his right to testify. *Id.* at 609, 181 P.3d at 535. The district court granted summary disposition, finding a lack of prejudice, and this Court affirmed. *Id.* at 611, 181 P.3d at 537. We stated that "when a defendant asserts he was prevented from testifying, his proposed testimony can be readily compared with the evidence produced at trial in order to determine if the result would have been different with his testimony." We noted that much of the proffered evidence was presented to the jury, the implications Kuehl wished to raise were made apparent to the jury, and that his proposed testimony merely pitted his word against other evidence "making it more likely that the jury would not have believed his story." We concluded that "the trial evidence against Kuehl, though circumstantial, was overwhelming, and the lack of his testimony did not affect the verdict." *Id.*

During trial, Tapp's counsel attempted to expose coercive interrogation techniques on the part of the police. Sergeant Fuhriman was cross-examined on the use of coercive tactics and accused of coercing Tapp into his confession. Fuhriman admitted to using "deceptive" questioning techniques. Tapp's counsel spent considerable time cross-examining officers to suggest that they took advantage of and coached Tapp into his statements and confession. Thus, much of the proffered evidence was presented to the jury and the implications Tapp wished to raise were made apparent to the jury.

While this Court stated: "The State's case was based almost entirely upon Tapp's confessions to having helped other men rape and murder Dodge; no physical evidence linked Tapp to the crime." *Tapp*, 136 Idaho at 358, 33 P.3d at 832, the State provided other evidence that tended to corroborate the confession. The State called forensic experts to testify regarding

how the crime was committed based on the physical evidence. The crux of the State's case was that Tapp's confession provided accurate forensic details which the officers had not divulged to him prior to his confession. The officers that interviewed Tapp testified about consistencies between Tapp's confession and the forensic evidence that the public did not know. J.S. testified that a month after the murder she overheard Hobbs tell a nervous Tapp to keep calm or he "was going to blow the alibi." D.O. testified that a few days after the murder she overheard Tapp say that he stabbed Dodge because she owed money for crank, he held her down while she was raped and killed, Hobbs slit her throat, and Tapp got blood on his shirt. J.B. lived with Tapp during the time of the murder and testified Tapp left the night of the murder wearing his favorite shirt and returned at 3:00 or 4:00 am without it and J.B. did not see the shirt again. F.E. testified that one day in June or July 1996, Hobbs returned home with blood on his shoes. A.O. testified that the morning after the murder she saw Hobbs down at the river with his shirt slung over his shoulder and crying because Dodge had been killed. Other evidence showed that this was before Dodge's murder had become public information.

The district court determined that, since the record was devoid of the rationale for trial counsel not calling Tapp to testify, for purposes of the motion for summary dismissal, the court would assume that the failure to call Tapp was against his wishes and therefore deficient performance. The court, thus, proceeded to the prejudice analysis. The district court found that Tapp had failed to raise a genuine issue of material fact regarding prejudice because Tapp did not demonstrate a reasonable probability that the outcome would be different if Tapp had testified in light of his actual statements and participation in the police questioning as presented on the videotapes. The court concluded:

In viewing the videotapes, the jury was able to make a determination whether Tapp's statements were freely and voluntarily given, or the subject of coercion and undue pressure. Based upon the Court's review of the videotapes, the Court finds no merit to the latter argument. In the Court's opinion, any testimony by Tapp at the time of trial that his prior statements for some reason should not be give [sic] credence would be given little or no weight and as such, it is not reasonably probable that any such testimony would change the outcome of the trial. To the extent counsel erred by not allowing Tapp to testify, such was harmless error.

(Footnote omitted.)

We too conclude that on this record, Tapp failed to demonstrate a genuine issue of material fact as to the second prong of the *Strickland* analysis, prejudice, that but for the attorney's deficient performance, the outcome of the trial would have been different. The district court correctly granted summary dismissal of Tapp's claim of ineffective assistance of counsel for failure to call Tapp to testify at trial.⁶

E. Ineffective Assistance of Appellate Counsel for Failing to Argue the “Fruit Of The Poisonous Tree” Doctrine as a Reason to Suppress the January 29 Confession

On direct appeal, Tapp successfully argued that information from the January 15 and 17 interviews should have been suppressed. *Tapp*, 136 Idaho at 363, 33 P.3d at 837. However, the January 29 confession was not suppressed, and it was deemed sufficient to sustain the conviction. *Id.* at 356-66, 33 P.3d at 839-40. Tapp argues that appellate counsel was ineffective in failing to argue that the January 29 confession, if not otherwise suppressible, was “fruit” of the illegal interviews held on January 15 and 17 and, thereby, should have been suppressed. In essence, Tapp argues that the officers used information gained in the illegal interrogations to obtain statements from Tapp on January 29.

Evidence obtained as a result of an illegal search is inadmissible in the criminal trial of a defendant. *State v. Brauch*, 133 Idaho 215, 219, 984 P.2d 703, 707 (1999); *State v. Johnson*, 110 Idaho 516, 524, 716 P.2d 1288, 1296 (1986). This includes evidence uncovered as a direct result of an illegal search and evidence later discovered is a “fruit of the poisonous tree.” *Segura v. United States*, 468 U.S. 796, 804 (1984). An interview may also be irreparably tainted by a prior illegal interview. *State v. Smith*, 119 Idaho 96, 100, 803 P.2d 1002, 1006 (Ct. App. 1990).

It is the defendant's initial burden of going forward with evidence to show a factual nexus between the illegal search and the State's acquisition of evidence. *State v. McBaine*, 144 Idaho 130, 133, 157 P.3d 1101, 1104 (Ct. App. 2007). This requires showing that the evidence sought to be suppressed would not have come to light but for the State's illegal conduct. *State v. Wigginton*, 142 Idaho 180, 184 125 P.3d 536, 540 (Ct. App. 2005). A defendant must show the connection between the illegal evidence and the evidence he seeks to suppress before

⁶ While we express no opinion as to the merits of the suppression issues discussed above, for purposes of this analysis, it is assumed Tapp's taped confession from January 29 was appropriately before the jury.

suppression is appropriate. *State v. Fancher*, 145 Idaho 832, 840, 186 P.3d 688, 696 (Ct. App. 2008).

Assuming a factual nexus is established, the State has the ultimate burden of persuasion to show that the evidence is untainted. *McBaine*, 144 Idaho at 133, 157 P.3d at 1104. The State can establish this by showing: (1) the evidence was discovered through an independent source, (2) the discovery was inevitable, or (3) the unlawful conduct was adequately attenuated. *Fancher*, 145 Idaho at 839, 186 P.3d at 695. Not all evidence is fruit of the poisonous tree simply because it would not have come to light without the illegal actions. The question is whether that evidence has been obtained by exploitation of the illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 478-88 (1963). The court must consider three factors when determining whether the unlawful conduct has been sufficiently attenuated: (1) the amount of time that elapsed between the misconduct and the acquisition of the challenged evidence, (2) whether there are intervening circumstances, and (3) the flagrancy and purpose of the improper police action. *State v. Page*, 140 Idaho 841, 846, 103 P.3d 454, 459 (2004). No one factor is determinative and the test only requires a balancing of the relative weights of all of the factors, viewed together, in order to determine if the police exploited illegally discovered evidence. *State v. Schrecengost*, 134 Idaho 547, 549, 6 P.3d 403, 405 (Ct. App. 2000).

The State contends that Tapp failed in his initial burden to establish a factual nexus, that the “evidence was discovered through an independent source,” and that any unlawful conduct was adequately attenuated. Tapp contends that he has established a factual nexus, that the information used to obtain his statements on January 29 came from the illegal interviews of January 15 and 17, and that attenuation has not been shown because the length of time was relatively short, there were no intervening circumstances, Tapp was not *Mirandized* prior to the January 29 interview, and the basis for suppression of the interviews on January 15 and 17 was flagrant misconduct.

Tapp did not address the factual nexus in his briefing to the district court nor was the issue argued at the summary disposition hearing. The district court, thus, found that Tapp “did not identify what misconduct constitutes the alleged ‘poisonous tree.’” The district court held that appellate counsel requested suppression of all interviews and that the admissibility of the statements was fully presented to this Court, belying the claim of deficient performance. In

addition, the district court determined that it had been presented with no basis to conclude that a “fruit of the poisonous tree” argument would have yielded a different result.

Tapp’s attempt to draw the required nexus for the first time on appeal also falls short. Tapp suggested certain statements made by officers on January 29 demonstrate the nexus. He noted that the officer told him that the information he had provided was “bogus” and not “panning out,” that he had failed polygraphs, that they were “not there yet” in the investigation, that the police had spent “serious money” following up, and were “hammered” at Tapp because they thought he had “screwed [them] big time.” He further suggests that the officer indicated that he knew Tapp was at the crime scene and that they “got him there” and “got him involved,” but that while others were mad, this officer, referring to a tie tack of a guardian angel, would protect him. These alleged statements by the officers regarding police sentiments developed from their investigative efforts, including frustrated efforts, do not draw a factual nexus between illegally obtained evidence and the exploitation of that illegal evidence to obtain Tapp’s incriminating statements. Tapp failed to articulate the information the officers obtained from the illegal interrogations and how it engendered acquisition of his statements on January 29.

The State contends that information which Tapp now claims came from the interviews of January 15 and 17, was partially or entirely gained from the independent or alternative sources of Tapp’s legal interviews on January 7, 10, a portion of the interview on 11⁷ and 18, and that Tapp’s effort to draw a nexus further fails on this basis as he does not distinguish the source of the statements made by the officer from legal and tainted sources. Particularly, the State points out that the officers knew Tapp was involved because Tapp told officers that Hobbs committed the murder in an interview prior to January 15 and Tapp failed a polygraph. Tapp was arrested as an accessory on January 11, prior to any eventually suppressed statements. Tapp’s January 18 interview with officers supports the State’s argument that the information came from an independent source. During that interview, Tapp described the crime and admitted to his presence but maintained through the interview that he was trying to get Hobbs to leave and he had no part in the stabbing, sex acts, or murder. Tapp admitted to going to Dodge’s apartment with Hobbs and Sargis at around 12:30 to 1:00 am. Tapp said that upon entering, Hobbs and Dodge began arguing and then Hobbs stabbed Dodge twice with a knife. Tapp related that

⁷ Only statements made prior to the arrival of his attorney were suppressed.

Hobbs and Sargis then held her down and both of them raped her and threatened to kill her if she resisted. Then, Tapp said, Hobbs cut her throat and killed her. After the interview on January 18, the officers received the results of the DNA tests showing that the semen found at the crime did not match Hobbs, Sargis, or Tapp. The discrepancy between the DNA results and Tapp's story of the crime was a source for the officers' belief that Tapp's story was "bogus," that police efforts were frustrated by his story, and that he was placed at the scene.

Further, regarding attenuation, twelve to fourteen days elapsed between the interviews on January 15 and 17 and the interview of January 29, between which a legal interview was conducted on January 18. Tapp met his counsel after the interview on January 17 and before the interview on January 29. Finally, while this Court does not condone the police officers' conduct, the improper conduct on January 15 and 17 was not flagrant police misconduct. The basis for suppression was that counsel was seated outside the interview room rather than inside the room, which although indefensible, did not amount to flagrant misconduct in this context. The district court correctly determined that the "fruit of the poisonous tree" argument would not have yielded a different result.

III.

CONCLUSION

The district court's summary dismissal is reversed and remanded for an evidentiary hearing on whether Tapp's trial counsel was ineffective during the suppression hearing for: (1) failing to present evidence Tapp was in custody during the January 29 interview, and (2) failing to present evidence of Tapp's diminished mental capacity to show the confession was involuntary. The district court's summary dismissal is affirmed as to Tapp's claims of: (1) ineffective assistance of trial counsel for failure to call Tapp to testify, (2) error for failure to consider ineffective assistance of counsel as a direct violation of the right to testify, and (3) ineffective assistance of appellate counsel for failure to argue the fruit of the poisonous tree doctrine.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**